FILED
JAN 15 2015
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SUPREME COURT, U.S.

No. 14-7955

IN THE SUPREME COURT OF THE UNITED STATES

Charles F. Warner; Richard E. Glossip; John M. Grant; and Benjamin R. Cole, by and through his next friend, Robert S. Jackson, Petitioners,

vs.

Kevin J. Gross, Michael W. Roach, Steve Burrage, Gene Haynes, Frazier Henke, Linda K. Neal, Earnest D. Ware, Robert C. Patton, and Anita K. Trammell, Respondents.

*****CAPITAL CASE*****
EXECUTION OF CHARLES WARNER
SCHEDULED FOR 6:00 PM (CST)
THURSDAY, JANUARY 15, 2015

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners have presented this Court with questions of national significance—questions that courts of appeals have been asked to address in the absence of this Court's guidance. Whether states may use a lethal-injection protocol that is pharmacologically and constitutionally far removed from the protocol the Court approved in *Baze v. Rees*, 553 U.S. 35, 44 (2008), is an issue of national importance. *See* Sup. Ct. R. 10(c). Whether the courts have the proper tools to carefully evaluate these experimental protocols that use constitutionally suspect drugs also is a matter of national importance. *See* Sup. Ct. R. 10(c). And, whether states are entitled to execute prisoners in an unconstitutional manner if the prisoners are unable to design and recommend an alternative drug formula to the government is a matter of national importance as well. *See* Sup. Ct. R. 10(c).

Yet despite Petitioners' explanation of these *novel* issues—issues that transport the current execution landscape beyond *Baze*'s well-established safe harbor—Respondents claim this Court's attention is unnecessary because Petitioners "disagree with results that have stemmed from the *Baze* decision." (Brief in Opp'n to Pet. Writ Cert. at pdf page 7/16.) But "results" that address a drug pharmacologically unable to meet *Baze*'s requirements do not and cannot "stem from" *Baze*.

Instead, as Petitioners have demonstrated through testimony of practicing medical doctors, and supported with medical and scientific studies, *no* dose of midazolam can comply with *Baze*'s requirement of a drug that creates a "deep, comalike unconsciousness." 553 U.S. at 44. Respondents' reliance on a dose increased from the amount used in the execution of Clayton Lockett (Br. in Opp'n at pdf page 9/16 nn. 2 & 3) does not salvage the protocol's constitutionality, because, as Arizona's execution of Joseph Wood demonstrated, midazolam's ceiling effect means that a larger dose cannot have a greater effect. The Wood execution, which used 750 mg of midazolam—250 mg more than that required in Oklahoma's execution protocol—resulted in Mr. Wood gasping and struggling to breathe for nearly two hours before he finally died.

Equally irrelevant is Respondents' argument, and the Tenth Circuit's holding, that Oklahoma's protocol is constitutional because it added procedures relating to intravenous lines and "consciousness checks" (of the type addressed in *Baze*, 553 U.S. at 55-56). These measures are irrelevant because *no dose* of midazolam can reliably produce the deep, comalike unconsciousness that *Baze* requires.

But because this Court has not addressed lethal-injection protocols that are removed from the *Baze* landscape, the Tenth Circuit and other circuits have had to

address these questions in light of *Baze*[1]—a decision that could not have addressed the states' novel approaches to execution protocols. Indeed, the Tenth Circuit stated that it would continue to do so "absent superseding . . . Supreme Court decisions." (App. A at 20.)

Respondents misconstrue the absence of this Court's previous decisions not to review *Baze*-related questions. (Br. in Opp'n at pdf pages 13/16) (asserting that "this Court has had numerous opportunities since deciding *Baze* to clarify any misapplication by lower courts, and has in every instance declined to address the issue"). While the Court's decision to decline review in a case "imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923), Respondents ignore the fact that the Court has not been asked to address the constitutionality of these novel drugs; nor has it been asked to resolve questions about the changed landscape since *Baze*. The fact that the Court has not previously reviewed its decision in *Baze* supports rather than undercuts Petitioners' argument that the time has come for the Court to provide necessary guidance.

Respondents argue that because "Florida has established an impressive track record of successful executions using midazolam[,] [t]hat fact alone makes that

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[1] As Petitioners explained (Pet. Writ Cert. at 23), the Tenth Circuit's decision in *Powell v. Jones*, 627 F.3d 1336 (10th Cir. 2010), which related to a lethal-injection protocol using a barbiturate similar to sodium thiopental, addressed matters that existed as part of the original *Baze* landscape. (*Cf.* Br. in Opp'n at pdf page 10/16.)

method a logical and workable choice . . " (Br. in Opp'n at pdf page 8/16.) But "logical and workable" are not proper Eighth Amendment standards; neither is a "me too!" approach. Moreover, as Petitioners have explained, "availability" does not equal "constitutional." (Pet. Writ Cert. at 23.) These cannot be the measures by which states assert compliance with the Eighth Amendment, and this Court should not countenance such an approach.

Respondents also rely on the assertion that Florida has used its protocol—the one that Oklahoma now intends to use—ten times "without serious incident." (Br. in Opp'n at pdf page 7/16.) Respondents not only do not explain what the phrase "without serious incident" means, but they also fail to account for the manner in which the paralytic masks (when properly administered, unlike the situation in Oklahoma's execution of Clayton Lockett) effects of any other aspect of the execution. But absence of evidence is *not* evidence of absence. Conversely, Petitioners have offered medical and scientific data, as well as data obtained from the three executions that did not include a paralytic (either by accident or design), and that thus exposed the true effects (or, rather, lack thereof) of midazolam on condemned prisoners.

Finally, Respondents claim that Oklahoma has a "sacred duty to enforce its criminal judgments." (Br. in Opp'n at pdf page 9/16.) But this "sacred duty" includes the Eighth Amendment requirement that Oklahoma carry out its criminal

judgments *in a constitutional manner*. The State is entitled to execute prisoners (including Petitioners) only in a constitutional manner, and without regard to the underlying facts of their conviction. Respondents cannot use the facts of a conviction as justification to obliterate constitutional protections, nor as justification to short-circuit constitutional review.

CONCLUSION

Accordingly, Petitioners respectfully ask that this Court grant the petition for writ of certiorari, review Oklahoma's use of midazolam in its lethal-injection protocol, and provide the guidance that courts, states, and prisoners need as they navigate this lethal-injection terrain.

Respectfully submitted: January 14, 2015.

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